IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PRAKASH PATEL,	
Intervenor-Plaintiff,	CIVIL ACTION
v.	FILE NO. 1:15-CV-03862-TCB
JAY R. PATEL, *et al.*,	**JURY TRIAL DEMANDED**
Defendants.	

RESPONSE IN OPPOSITION TO THE MOVING DEFENDANTS'[1] MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT[2]

I. INTRODUCTION

In their Motion to Dismiss ("the Moving Defendants' Brief"), the Moving Defendants focus primarily on Plaintiff's fraudulent inducement claim.[3] They

[1] Borrowing Defendants' definition, Plaintiff refers to Movants Jay Patel ("Jay"), Shama Patel ("Shama"), 218 Capital Partners, LLC ("218 Capital Partners"), Carnegie Café, LLC, Carnegie Hotel Manager, LLC, Chelsea Capital Partners, LLC, Diplomat Companies, LLC, Diplomat Hospitality, II, LLC, Diplomat Hospitality, III, LLC, Diplomat NBD Hotels, LLC, RM Kids, LLC, and RM Kid One, LLC as the Moving Defendants.

[2] Plaintiff hereby withdraws his claim for tortious interference with business relations. (First Amended Verified Complaint of Prakash Patel ("FAC"), Doc. No. 92, Count Three.) Accordingly, Plaintiff does not oppose the Moving Defendants' Brief to dismiss that claim.

argue that Plaintiff fails to state a fraudulent inducement claim and, therefore, cannot rescind the parties' March 23, 2012 Settlement Agreement ("the Settlement Agreement"). Because, according to the Moving Defendants, Plaintiff cannot rescind the Settlement Agreement, the release in the Settlement Agreement bars all of his asserted claims.

Notably, the Moving Defendants *do not* dispute that Plaintiff sufficiently alleges the key elements of a fraudulent inducement claim, *i.e.*, that, in connection with the Settlement Agreement, the Settling Defendants falsely stated material facts and made false promises; that they acted with scienter; and that Plaintiff reasonably relied upon their false representations.

Instead, the Moving Defendants press two technical arguments. First, the Moving Defendants argue that Plaintiff fails to sufficiently allege the element of "damages." The FAC alleges that—both *before* and *after* the parties entered into the Settlement Agreement—the Settling Defendants contacted government officials regarding Plaintiff, falsely accused Plaintiff of committing various crimes, and requested his deportation and incarceration. The proposition that Plaintiff suffered no harm as a result of this conduct is facially absurd, as most powerfully demonstrated by the fact that a Gwinnett County jury has *already concluded that*

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[3] Moving Defendants' Brief, Doc. 108-1, pp. 9-13; FAC, Count I.

Jay's conduct amounted to defamation per se, justifying an award of damages to Plaintiff.

Second, Moving Defendants argue that Plaintiff waived his right to rescind the Settlement Agreement because, in the DeKalb Action, he initially sought to enforce the Agreement's payment terms. As the Moving Defendants well know, Plaintiff initiated the DeKalb Action on April 24, 2015, Jay sent the emails that supply the factual basis for Plaintiff's rescission claim on May 12, 2015, and Plaintiff thereafter promptly amended his complaint to seek rescission. When Plaintiff initiated the DeKalb Action, he was not yet aware of the facts that support his rescission claim, so he could not possibly have waived his right to rescind by not asserting such a claim in his original complaint.

II. ARGUMENT AND CITATIONS OF AUTHORITY

1. Plaintiff States a Viable Fraudulent Inducement Claim.

   a. *Plaintiff Sufficiently Alleges Damages Arising from the Fraudulent Inducement.*

Moving Defendants first argue that Plaintiff's fraudulent inducement claim fails because he does not allege sufficient facts to satisfy the "damage to [the] plaintiff' element. (Moving Defendants' Brief, p. 10) (*citing Sun Nurseries, Inc. v. Lake Erma, LLC*, 316 Ga. App. 832, 835 (2012)).[4]

This argument misses the entire point of Plaintiff's fraudulent inducement claim. As Plaintiff alleges in paragraph 205 of the FAC, "[i]n good faith and justifiable reliance on the Settling Defendants' false warranties and false promises, [he] entered into the Settlement Agreement, *thereby compromising his claims against the Settling Defendants for less than the full amount actually due him*." (FAC, ¶ 205) (emphasis added). That is, Plaintiff's agreement to release his claims (and forebear suit) in exchange for less than the claims' full value, which he expressly conditioned on the Settling Defendants' false promises, constitutes the cognizable harm that Plaintiff suffered.[5]

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[4] Moving Defendants do not dispute that Plaintiff satisfies the other elements of a fraudulent inducement claim, which consist of "one party's misrepresenting a material fact concerning the subject matter of the underlying transaction and the other party's relying on the misrepresentation to his . . . detriment in executing a document or taking a course of action." *Golden v. FNF Servicing, Inc.*, CIV.A. No. 1:13-cv-33, 2015 WL 5302703, at *5 (M.D. Ga. Sept. 10, 2015) (citations omitted).

[5] Plaintiff's forbearance is particularly important given the timing of the Settlement Agreement. As the Moving Defendants acknowledge, the parties entered into the Settlement Agreement shortly before the sale of the 218 Peachtree Building. (Moving Defendants' Brief, p. 6.) By settling, Plaintiff surrendered any leverage he had with respect to that transaction. Stated differently, Plaintiff forewent legally challenging the $7.8 million-dollar fraudulent transfer of the 218 Peachtree

The Moving Defendants focus instead on the harms that flowed (or, they say, did *not* flow) from the conduct they undertook in derogation of their false promises. (Moving Defendants' Brief, p. 11.) That conduct—which occurred both *before* and *after* the formation of the Settlement Agreement—consisted of numerous false statements to government officials aimed at causing Plaintiff's incarceration or deportation and the destruction of his business.[6] (*Id.*; *see also* FAC, ¶¶ 128-163.) Assuming for sake of argument that the Moving Defendants properly focus on the damages arising from *that* misconduct (as opposed to the damages that resulted from their fraudulent inducement of the Settlement Agreement), Plaintiff has more than adequately pled the element of damages.

The Moving Defendants' argument centers on timing. They contend that, because Plaintiff only learned of the Government Contacts years after they occurred, he cannot—absent allegations of, for example, *actual* deportation or *actual* incarceration—rely on those Contacts to satisfy the "damages" element of

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Building to 218 Capital Partners, which resulted in the extinguishment of his interests in that Building. (FAC, ¶¶ 110-111.) The 218 Peachtree Building was later sold for $20.5 million dollars and—as specifically alleged in the FAC—Plaintiff derived nothing from [the] $20.5 million-dollar sale." (*Id.*, ¶117.) This allegation, even standing alone, suffices to establish the element of damages.

[6] The Moving Defendants refer to these false statements as the "Government Contacts," and Plaintiff adopts that shorthand for the sake of consistency and the avoidance of confusion. (Moving Defendants' Brief, p. 11.)

his claim.[7] The Moving Defendants cite no cases or other legal authorities that support this argument.[8]

The Moving Defendants' argument ignores the substance of the Government Contacts themselves. In Georgia, "[s]lander per se or libel per se 'consists of a charge that one is guilty of a crime, dishonesty or immorality.'" *Garner v. Academy Collection Service, Inc.*, CIV.A. No. 3:04-CV-93, 2005 WL 643680, at *4 (N.D. Ga. March 11, 2005) (citations omitted). "Such defamatory words are actionable per se because they 'are recognized as injurious on their face—without the aid of extrinsic proof.'" *Id.* (citations omitted). Here, Defendants'

[7] It should be noted that Plaintiff does not yet know the full extent of Defendants' efforts to damage his reputation, destroy his business, and cause his deportation, so it should not be presumed—as Defendants insinuate—that such contacts occurred only in 2011, 2012, and 2013. (Moving Defendants' Brief, p. 11.) The full extent of Defendants' conduct should and will be the subject of discovery in this case.

[8] The Moving Defendants presume that for Plaintiff to state a claim, he must have suffered damages at or around the time the Government Contacts occurred. However, they offer no legal support for that proposition. Plaintiff suffered concrete damages once he learned about the Government Contacts in May 2015. Even putting aside the emotional impact on Plaintiff, he was forced to defend an SEC complaint against his company, undergo numerous annual tax audits, and retain counsel to file a defamation suit to clear his name. (FAC, ¶¶ 160-163 & Ex. Q.) Under Georgia law, "delay and needless expenditure of time, energy, or resources, constitute 'appreciable' damage." *In re Pullen*, CIV.A. No. 07-65415, 2008 WL 8070378, at *5 (N.D. Ga. Bankr. Oct. 10, 2008) (citing O.C.G.A. § 51-12-4). Defendants' conduct caused Plaintiff such "appreciable damage" and the Moving Defendants identify no legal reason why those damages should be disregarded.

communications constitute defamation *per se*, for which damages are *presumed* under Georgia law.

For example, in Mike Patel's December 15, 2011 email to U.S. Citizenship and Immigration Services (which pre-dated the Settlement Agreement), Mike accused Plaintiff of immigration fraud and requested Plaintiff's deportation. (FAC, ¶ 151 & Ex. M.) In Jay's January 26, 2012 email to U.S. Citizenship and Immigration Services (which, again, pre-dated the Settlement Agreement), Jay accused Plaintiff of committing a host of federal crimes (including extortion, immigration fraud, perjury, predatory lending practices, RICO violations, and tax evasion) and also requested his immediate deportation. (*Id.*, ¶ 152 & Ex. L.)

Defendants' Government Contacts constitute defamation *per se*, for which damages are presumed under Georgia law, thus satisfying the "damages" element of a fraudulent inducement claim. *Garner*, 2005 WL 643680, at *4. Furthermore, even if damages were *not* presumed, Plaintiff's allegations demonstrate he did suffer *actual* damages. Indeed, an impartial Gwinnett County jury has *already concluded* that Jay's May 12, 2015 emails (to which were attached many of the other "Government Contact" communications) constitute libel and libel per se, for which it awarded Plaintiff damages. (FAC, ¶ 163 & Ex. Q.) In sum, Plaintiff has alleged "damages" sufficient to state a fraudulent inducement claim.

b. *Plaintiff Did Not Waive His Right to Rescind the Settlement Agreement.*

The Moving Defendants next argue that Plaintiff waived his right to rescind the Settlement Agreement. (Moving Defendants' Brief, pp. 11-13.) Essentially, the Moving Defendants contend that when Plaintiff instituted the "DeKalb Action," he irrevocably elected to affirm the Settlement Agreement.[9] (*Id.*) That is so, they argue, because Plaintiff's lawsuit originally sought to enforce, not rescind, the Settlement Agreement. (*Id.*) This argument is disingenuous.

As the Moving Defendants note, Plaintiff initiated the DeKalb Action on April 24, 2015. (*Id.*; *see also* FAC, ¶ 148.) But as the FAC specifically alleges, *after* Plaintiff filed the DeKalb Action, and *in response to his doing so,* Jay sent the May 12, 2015 emails which revealed to Plaintiff, for the first time, the nature, scope, and timing of the RICO Defendants' so-called "Government Contacts." (FAC, ¶ 149.) Shortly thereafter, on July 24, 2015, Plaintiff filed an amended complaint in which he alleged that he was fraudulently induced into entering into the Settlement Agreement—a fact that the Moving Defendants admit. (Moving Defendants' Brief, p. 13 n. 3) ("Plaintiff amended his complaint in the DeKalb Action to assert a fraudulent inducement claim based on Defendants'

[9] For the sake of consistency and the avoidance of confusion, Plaintiff adopts the Moving Defendants' definition of the "DeKalb Action."

communications with authorities.”). This chronology clearly establishes that Plaintiff promptly sought to rescind the Settlement Agreement after learning the facts which support his rescission claim. *See* O.C.G.A. § 13-4-60

Thus, Moving Defendants’ argument really reduces to whether the lapse of time between May 12, 2015 (when Jay sent his emails) and July 24, 2015 (when Plaintiff amended his complaint in the DeKalb Action) constitutes undue delay under Georgia law. And, to the extent any genuine issue exists in that regard,[10] it must be resolved by a jury. *Quasebarth v. Green Tree Servicing, LLC*, 90 F. Supp. 3d 1373, 1381 (M.D. Ga. 2015) (internal citations omitted). Accordingly, the Moving Defendants’ Brief to dismiss Plaintiff’s fraudulent inducement claim must be denied.

2. The Settlement Agreement Does Not Bar Plaintiff’s Breach of Fiduciary Duty Claim.

The Moving Defendants incorrectly argue that the release in the Settlement Agreement precludes Plaintiff from pursuing the breach of fiduciary claim. (Moving Defendants’ Brief, pp. 13-15.) Since Plaintiff states a viable fraudulent inducement claim, as shown above, the Moving Defendants’ argument fails.

[10] Having inaccurately framed the issue, the Moving Defendants cite no authority which supports the proposition that a two-month delay in seeking rescission bars the claim.

Accordingly, the Moving Defendants' Brief to dismiss Plaintiff's breach of fiduciary duty claim must be denied.

3. Plaintiff Properly States a Claim for Unjust Enrichment.

The Moving Defendants press two arguments for dismissal of Plaintiff's unjust enrichment claim. (Moving Defendants' Brief, pp. 16-17.) First, they argue that the Settlement Agreement bars the claim. (*Id.*) That argument fails for the same reasons already discussed.

Second, they argue that the FAC does not contain sufficient allegations to put them on notice of the nature of Plaintiff's claims. (*Id.*) But the FAC is not nearly as confusing as the Moving Defendants suggest.

Plaintiff claims that he (and his wholly-owned company) provided services to Defendants, in exchange for which he was given minority ownership interests in the entities that owned the Carnegie Building and the 218 Peachtree Building. (FAC, ¶¶ 3-5, 30-32.) Additionally, with respect to the Carnegie Building, Plaintiff alleges that he and his company provided development services for which he was promised a $761,000.00 "Development Fee." (*Id.*, ¶¶ 47-48.)

Plaintiff alleges that Defendants enriched themselves, at his expense, by diverting operating income from the Buildings and then using fraudulent means to cut him out of the profits from the sale of the Buildings. (*Id.*, ¶¶ 49, 59-60, 64-67, 79, 110-118.) Additionally, Plaintiff alleges that, with respect to the Carnegie Building, he received nothing for the value for the development services he provided. (*Id.*, ¶ 66.) Plaintiff's unjust enrichment claim is properly pled, and the Moving Defendants' Brief to dismiss the claim must be denied.

4. Plaintiff Properly States a Claim for Fraudulent Transfer.

The Moving Defendants make only one argument for dismissal of Plaintiff's fraudulent transfer claim: the familiar argument that the terms of the Settlement Agreement bar Plaintiff from pursuing that claim. (Moving Defendants' Brief, pp. 17-18.) That is, they argue that because, under the Settlement Agreement, Plaintiff surrendered his interests in Carnegie Hotels, Diplomat NBD, and 218 Capital Partners, he cannot allege he is a creditor of those entities for purposes of stating a fraudulent transfer claim. (*Id.*) Again, however, because Plaintiff states a viable fraudulent inducement claim, the Moving Defendants cannot invoke the terms of the Settlement Agreement to defeat Plaintiff's fraudulent transfer claim.

5. Plaintiff Properly States a Federal RICO Claim.

a. *Plaintiff Does Not Improperly "Lump Together" Defendants.*

The Moving Defendants level three arguments against Plaintiff's RICO Claim. First, they argue that the claim must be dismissed because Plaintiff impermissibly lumps together the RICO Defendants. (Moving Defendants' Brief,

p. 19.) Specifically, they contend that "[n]o specific allegations as to . . . acts of racketeering are made specifically against any Moving Defendant." (*Id.*) This contention is false.

Plaintiff states his Federal RICO claim against Moving Defendants Jay and Shama. (FAC, ¶ 1.) The FAC alleges that Jay, Shama, and the other RICO Defendants conspired, using various illegal means, to deprive Plaintiff of the value of his ownership interests in the Carnegie Building and the 218 Peachtree Building. (*See generally* FAC.)

The FAC contains at least thirty-nine (39) individually-numbered paragraphs which identify specific acts undertaken by Jay[11] and Shama[12] in furtherance of the conspiracy. Those acts include, *inter alia*, generating, signing, and transmitting, via mail and wire, false corporate and financial records; providing, via mail and wire, lenders and other third-parties involved in the subject real estate transactions with material false information upon which those parties relied; and transmitting, via mail and wire, false information and statements about Plaintiff in an effort to damage his reputation, destroy his business, and cause his deportation. (FAC, ¶¶ 50-56, 59- 63, 85-87, 95, 97, 99, 101, 103-107, 109-110, 113, 127, 135, 142, 149,

[11] FAC, ¶¶ 59- 63, 85-87, 95, 97, 99, 101, 103-107, 109-110, 113, 127, 135, 149, 152-153, 159, 162-163.

[12] FAC, ¶¶ 50-56, 109-110, 142, 161.

152-153, 159, 161-163.) In sum, Plaintiff makes numerous factual allegations directed specifically at Jay and Shama, which serve both to support his RICO claim and also put them on notice of the factual basis for that claim. The Moving Defendants' argument that Plaintiff's Federal RICO claim is insufficiently pled thus fails as a matter of law.

b. *The Settlement Agreement Does Not Bar Plaintiff's Federal RICO Claim.*

Next, the Moving Defendants argue that the release in the Settlement Agreement bars Plaintiff's RICO claim. (Moving Defendants' Brief, p. 20.) This argument fails for the same reasons previously discussed. Because Plaintiff states a viable fraudulent inducement claim, Plaintiff's RICO claim may proceed.

c. *The Statute of Limitations Does Not Bar Plaintiff's Allegations Regarding the Carnegie Building.*

Finally, the Moving Defendants argue that the statute of limitations bars Plaintiff's RICO allegations regarding the Carnegie Building. (Moving Defendants' Brief, pp. 20-22.) Whereas the Moving Defendants' prior argument invokes the Settlement Agreement against Plaintiff, this argument completely ignores its existence and its impact of Plaintiff's ability to pursue his RICO claim.

i. The RICO Defendants' Fraud Tolled the Statute of Limitations.

Under Georgia law, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." O.C.G.A. § 9-3-96. As this Court has stated:

> Fraud that will toll the statute of limitation requires: (1) actual fraud involving moral turpitude on the part of the defendant; (2) the fraud must conceal the cause of action from the plaintiff, thereby debarring or deterring the knowing of the cause of action; and (3) the plaintiff must have exercised reasonable diligence to discover the cause of action, notwithstanding the failure to discover within the statute of limitation.
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> "This rule is applied even where actual fraud is the gravamen of the action. The statute of limitation is only tolled until the fraud is discovered or by reasonable diligence should have been discovered."

Patel v. Diplomat 1419VA Hotels, LLC, No. 1:13-CV-01588-SCJ, 2016 WL 7985334, at *3 (N.D. Ga. Mar. 25, 2016) (citations omitted).

Here, Defendants' concealment of their fraudulent activity precluded Plaintiff from earlier pursuing his RICO claim and, as such, tolled the statute of limitations until such activity was discovered. As alleged in the FAC, the parties entered into the Settlement Agreement on March 23, 2012. (FAC, ¶ 133.) By entering into the Settlement Agreement, Plaintiff unquestionably agreed to release any claims (including RICO claims) he had or may have had against the RICO Defendants (including Jay and Shama). (*Id.*) But he conditioned such agreement on the Settling Defendants' promises that (a) they "possessed no knowledge of any 'complaint, investigation, inquiry or proceeding . . . other than the Action"; and (b) they would refrain from instituting such actions or interfering with, or disparaging, Plaintiff. (*Id.*, ¶¶ 134, 136.)

More than three years later, after the Settling Defendants defaulted on a payment obligation, Plaintiff instituted the DeKalb Action. (FAC, ¶¶ 139, 147-148.) On May 12, 2015, *after* Plaintiff filed that Action, Jay sent the emails that revealed to Plaintiff, for the first time, the facts upon which he bases his fraudulent inducement claim. (*Id.*, ¶ 149 & Ex. L.) Shortly thereafter, as discussed above, Plaintiff amended his complaint in the DeKalb Action to state a fraudulent inducement claim. (Moving Defendants' Brief, p. 13 n. 3.)

By these actions, the RICO Defendants committed fraud. They committed fraud by falsely warrantying, in the Settlement Agreement itself, that they lacked "knowledge of any 'complaint, investigation, inquiry or proceeding . . . other than the Action." *Dyer v. Honea*, 252 Ga. App. 735, 739 (2001) (holding that seller's false affidavit given in connection with restaurant sale supported viable fraud claim). Additionally, they committed fraud by promising that they would disparage or interfere with Plaintiff lacking a present intent to perform. *TechBios, Inc. v. Champagne*, 301 Ga. App. 592, 688 S.E.2d 378, 380 (Ga. Ct. App.2009) (stating that, under Georgia law, fraud "exists where a promise as to future events is made with a present intent not to perform or where the promisor knows that the future event will not take place."). A lack of present intent to perform "*can be inferred based on subsequent conduct of the defendant* that is unusual, suspicious, or inconsistent with what would be expected from a contracting party who had been acting in good faith." *JTH Tax, Inc. v. Flowers*, 302 Ga. App. 719, 691 S.E.2d 637, 642 (Ga. Ct. App. 2010) (citations omitted) (emphasis added).

The Settling Defendants concealed their fraud from Plaintiff who, until May 2015, reasonably and justifiably relied on the truth of Defendants' representations in the Settlement Agreement. Only on or after May 12, 2015 did Plaintiff become aware of the facts that support his fraudulent inducement claim; before May 12, 2015, Plaintiff did not know about the Settling Defendants' ongoing efforts to damage him and he therefore had no reason to seek rescission of the Settlement Agreement. Thus, the earliest that Plaintiff could have sought rescission of the Settlement Agreement (and stated his Federal RICO Claim) was May 12, 2015.

The Settling Defendants' fraud thus tolled the statute of limitations through that date. *See* O.C.G.A. § 9-3-96. As the Moving Defendants do not even address tolling, nor its impact on Plaintiff's RICO allegations concerning the Carnegie Hotel, their motion to dismiss must be denied.

ii. The RICO Defendants Should Be Equitably Estopped from Invoking the Statute of Limitations.

Even if the statute of limitations applied to Plaintiff's claim, the RICO Defendants should be equitably estopped from invoking it.

The doctrine of equitable estoppel is "employed to bar inequitable reliance on statutes of limitations." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1323 (11th Cir.1989). The doctrine is "rooted in the maxim 'that no man may take advantage of his own wrong,'" and it "'prevents a defendant whose representations or other conduct have caused a plaintiff to delay filing suit until after the running of the statutory period from asserting that bar to the action.'" *Bennett v. Advanced Cable Contractors, Inc.*, CIV.A. No. 1:12-Cv-115 (RWS), 2012 WL 1600443, at *3 (N.D. Ga. May 7, 2012) (citations omitted); *see also Marine Transp. Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp.*, 16 F.3d 1133, 1138 (11th Cir. 1994) ("Equitable estoppel 'is grounded on a notion of fair dealing and good conscience. It is designed to aid the law in the administration of justice where without its aid injustice might result.'") (citations omitted).

To invoke equitable estoppel, the plaintiff must show that he

> was misled by defendant or its agents so that [he] delayed suit because of (a) an affirmative statement that the statutory period to bring the action was longer than it actually was, or (b) *promises to make a*

> *better settlement of the claim if plaintiff did not bring suit* or (c) comparable representations and conduct.

Keefe, 867 F.2d at 1324 (citations omitted) (emphasis added).

The plaintiff "need not prove bad faith, but the conduct must be directed towards obtaining the delay in bringing suit, and must be motivated by a desire to lull the plaintiff into not bringing a lawsuit." *Barton v. Peterson*, 733 F. Supp. 1482, 1491 (N.D. Ga. 1990). "'The constituent elements of equitable estoppel constitute questions of fact . . ." *Marine Transp.*, 16 F.3d at 1138 (citations omitted).

Equitable estoppel "has been successfully invoked. . . in cases where the defendant promised to pay the claim or to settle if the plaintiff did not file suit." *Sanchez v. Loffland Bros. Co.*, 626 F.2d 1228, 1231 (11th Cir. 1980); *accord Bennett*, 2012 WL 1600443, at *4 (citations omitted); *Barton*, 733 F. Supp. at 1491 (citing *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979)).

Here, as shown above, Defendants fraudulently induced Plaintiff to enter into the Settlement Agreement by making false representations and false promises. By agreeing to settle, Plaintiff surrendered his right to challenge the legal propriety of the impending sale of the 218 Peachtree Building. Despite the Settlement Agreement, the RICO Defendants persisted with their efforts to defame Plaintiff, damage his business, and cause his incarceration or deportation. The RICO

Defendants, however, concealed their misconduct from Plaintiff until long after the parties entered into the Settlement Agreement and long after they sold the 218 Peachtree Building.

These allegations, accepted as true, give rise to a fact question as to the application of equitable estoppel to Plaintiff's RICO claim. *Marine Transp.*, 16 F.3d at 1138 ("'The constituent elements of equitable estoppel constitute questions of fact . . .") (citations omitted). If, as Plaintiff alleges, the RICO Defendants "lull[ed] [him] into not bringing a lawsuit" by agreeing to a settlement that contained false terms and which they never intended to honor, then the doctrine of equitable estoppel would preclude them from invoking the statute of limitations to Plaintiff's RICO claim. *Barton*, 733 F. Supp. at 1491; *see also Sanchez*, 626 F.2d at 1231; *Bennett*, 2012 WL 1600443, at *4. Accordingly, it would be inappropriate to dismiss Plaintiff's federal RICO claim as time-barred at the pleadings stage. *Ward*, 2015 WL 1020151, at *9 (citations omitted)

iii. The "Separate Accrual" Rule Applies.

Even if the RICO Defendants *could* invoke the statute of limitations, it would not bar Plaintiff's RICO claim. "A civil RICO claim accrues and the four-year limitations period begins to run 'when the injury was or should have been discovered, regardless of whether or when the injury is discovered to be part of a pattern of racketeering activity.'" *Frantz v. Walled*, 513 Fed. Appx. 815, 821 (11th Cir. 2013) (citations omitted).

Under the "separate accrual" rule, however, "if a new RICO predicate act gives rise to a new and independent injury, the statute of limitations clock will start over for the damages caused by the new act." *Lehman v. Lucon*, 727 F.3d 1326, 1331 (11th Cir. 2013) (citations omitted); *accord Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997) ("'[E]ach overt act that is part of the violation and that injures the plaintiff' . . . 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.'") (citations omitted); *Frantz*, 513 Fed. Appx. at 821 ("If a single RICO violation gives rise to multiple 'new and independent injur[ies],' a new civil RICO claim may accrue with each injury regardless of when the original acts occurred.") (citations omitted) (alteration in original).

"'[T]wo elements characterize an overt act which will restart the statute of limitations: 1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must inflict *new and accumulating injury* on the plaintiff.'" *Pilkington*, 112 F.3d at 1537 (quoting *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234 (9th Cir. 1987).

Here, even if the statute of limitations applied, it would only apply to acts that occurred *before* March 9, 2012—the date four (4) years before Plaintiff filed his original RICO Complaint. (Doc. No. 57.) Plaintiff's Complaint, however, alleges that he sustained new and independent injuries from acts that occurred *after* March 9, 2012.

First, the parties entered into the fraudulently induced Settlement Agreement on March 24, 2012, within the limitations period. (FAC, ¶ 133.) The RICO Defendants made false representations and false promises which induced Plaintiff to assent to the Settlement Agreement on that date. (*Id.*, ¶¶ 141.) They also engaged in conduct in derogation of the terms of the Settlement Agreement *after* that date. (*Id.*, ¶¶ 142-146, 149-150, 156-163.)

Second, the RICO Defendants fraudulently transferred the 218 Peachtree Building on April 9, 2012, within the limitations period. (*Id.*, ¶¶ 109-114.) Plaintiff relinquished his rights with respect to the 218 Peachtree Building only because Defendants fraudulently induced him to enter into the Settlement Agreement.

The foregoing acts constitute "new and independent" acts, not mere "reaffirmation[s] of previous act[s]." *Pilkington*, 112 F.3d at 1537. While the sale of the Carnegie Hotel occurred prior to March 9, 2012, Plaintiff's separate allegations the Settlement Agreement and the 218 Peachtree Building are separate and independent.

Defendants' conduct with respect to the Settlement Agreement and the 218 Peachtree Building also caused Plaintiff new and independent injuries. *Frantz*, 513 Fed. Appx. at 821. Defendants' fraudulent inducement of the Settlement Agreement, subsequent campaign of defamation and harassment, and fraudulent transfer of the 218 Peachtree Building caused Plaintiff to suffer injuries separate and independent of his damages related to the Carnegie Building.

In this sense, this case is analogous to *Bivens Gardens Office Building., Inc. v. Barrett Bank of Florida, Inc.*, 906 F.3d 1546 (11th Cir. 1990), *abrogated on other grounds by Rotella v. Wood*, 528 U.S. 549, 555 (2000). In *Bivens*, the plaintiffs filed a federal RICO action alleging that defendants had unlawfully deprived them of their interest in a hotel property by engaging in three separate categories of conduct—"by conspiring to a) take over the ownership of [the entity that held the asset] and control of the management and assets of [the entity], b) mismanage and divert the assets of [the entity] to the their own use, and c) wrongfully sell the hotel for less than its fair market value." *Id.* at 1549. The alleged takeover occurred in 1975. *Id.* at 1551. The alleged mismanagement occurred between February, 1975 and April, 1981. *Id.* And the sale of the hotel also occurred in April, 1981. *Id.* The plaintiffs filed suit in 1983. *Id.* at 1548. The district court dismissed plaintiffs' federal RICO claim as time-barred, a ruling which called upon the Eleventh Circuit to "decide the appropriate accrual rule to apply when the complaint alleges that, as the result of the conspiracy to violate RICO . . . , the plaintiffs suffered several independent harms at the hands of the defendants over a period of eight years." *Id.* at 1548, 1550.

The Eleventh Circuit applied the "separate accrual" rule and held that the "mismanagement and wrongful diversion of corporate assets between 1975 and 1981, and the wrongful sale of the [entity's] major asset , the [hotel], in 1981, were 'new and independent' injuries because they were not injuries that naturally flowed from the wrongful takeover of the corporation [in 1975]." *Pilkington,* 112 F.3d at 1537 (summarizing holding in *Bivens*). Rather, these "'new and independent' injuries involved independent breaches of duties owed by the defendants as corporate officers and directors." *Id.* (same).

Similarly, in this case, Plaintiff alleges that Defendants conspired to commit new and independent acts, which caused him new and independent injuries, apart from those he suffered due to Defendants' conduct with respect to the Carnegie Building. Accordingly, even if the statute of limitations applied, and even if the doctrine of equitable estoppel did not preclude Defendants from asserting it, Plaintiff's claim would nevertheless survive because his allegations related to the Settlement Agreement and the 218 Peachtree Building constitute new and independent acts causing new and independent injuries.

6. Plaintiff's Receivership and Accounting Claims Should Proceed.

The Moving Defendants argue that Plaintiff cannot seek the appointment of a receiver, nor request an accounting, because Plaintiff no longer possesses an interest in the Family Businesses and, also, because he fails to state any claim upon which relief may be granted. (Moving Defendants' Brief, pp. 22-24.)

These arguments fail for the same reasons discussed above: Plaintiff only surrendered his interests in the Family Businesses because of the Settlement Agreement. Plaintiff properly states a claim that the Settling Defendants fraudulently induced him to enter into that Agreement. Because Plaintiff properly states a claim for fraudulent inducement, Plaintiff may pursue his other claims against Defendants, all of which arise from Defendants' unlawful deprivation of the value of his ownership interests in the Carnegie and 218 Peachtree Buildings. Thus, Plaintiff *does* state viable claims against Defendants and the assertion of those claims (which relate to his ownership interests in the entities that owned the Buildings) gives him standing to seek an accounting and a receivership.

Moreover, the Moving Defendants' argument is premature. While the FAC includes claims for a receivership and an accounting, Plaintiff has not yet moved for either type of relief. The appropriate time to determine the propriety of such relief is when Plaintiff formally seeks it. The Moving Defendants will obviously have an opportunity to oppose any motion seeking an accounting or the appointment of a receiver.

7. Plaintiff States a Viable Claim for Attorneys' Fees under O.C.G.A. § 13-6-11.

The Moving Defendants argue that Plaintiff cannot state a claim for attorneys' fees under O.C.G.A. §13-6-11 because his underlying claims fail. Again, because Plaintiff states viable claims against the Moving Defendants (for the reasons discussed above), Plaintiff is entitled to pursue a claim for attorneys' fees under O.C.G.A. § 13-6-11, and Defendants' motion to dismiss that claim must be denied.

This 21st day of April, 2017.

FRIED & BONDER, LLC
/s/ Joseph A. White
Scott L. Bonder
Georgia Bar No. 066815
Joseph A. White
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LR 7.1(D) CERTIFICATE OF FONT COMPLIANCE

I hereby certify that the foregoing has been prepared with one of the font and point selections approved by the Court in Rule 5.1(C) of the Civil Local Rules of Practice for the United States District Court for the Northern District of Georgia, specifically, Times New Roman 14 pt.

FRIED & BONDER, LLC

/s/ Joseph A. White
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PRAKASH PATEL, Intervenor-Plaintiff, v. JAY R. PATEL, MUKESH PATEL, RAJESH C. PATEL, RISHI PATEL, SHAMA PATEL, 218 CAPITAL PARTNERS, LLC, CARNEGIE CAFÉ, LLC, CARNEGIE HOTEL MANAGER, LLC, CHELSEA CAPITAL PARTNERS, LLC, DIPLOMAT COMPANIES, LLC, DIPLOMAT HOSPITALITY II, LLC, DIPLOMAT HOSPITALITY III, LLC, DIPLOMAT NBD HOTELS, LLC, RM KIDS, LLC and RM KID ONE, LLC, Defendants.	CIVIL ACTION FILE NO. 1:15-CV-03862-TCB **JURY TRIAL DEMANDED**

CERTIFICATE OF SERVICE

I hereby certify that I have on April 21st, 2017, served a true and accurate copy of the foregoing **RESPONSE IN OPPOSITION TO THE MOVING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED VERIFIED COMPLAINT** with the Clerk of Court using the CM/ECF system which will automatically send to the following attorneys of record:

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